DOCUMENT RESUME

ED 207 457 HE 014 414

AUTHOR	Duryea, E. D.
TITLE	The Corporate Authority of Governing Boards of Colleges and Universities at the Turn of the Century: A Review of Statutes and Court Decisions.
INSTITUTION	State Univ. of New York, Buffalo. Dept. of Higher Education.
REPORT NO	SUNY-OP-9
PUB DATE	May 81
NOTE	88p.
AVAILABLE FROM	Department of Higher Education, Faculty of Educational Studies, State University of New York at Buffalo, Buffalo, NY 14260.
EDRS PRICE	MF01/PC04 Plus Postage.
DESCRIPTORS	Comparative Analysis; *Court Litigation; Educational History; *Governance; Governing Boards; Higher Education; *Institutional Autonomy; *Private Colleges; *State Colleges

ABSTRACT

The American system of higher education governance is examined by exploring the corporate authority of governing boards at the turn of the century, from the 1880s to World War I, to establish a baseline from which to evaluate changes in this authority resulting from the changing role of federal and state governments in higher education since World War II. The sample used included 17 public and 10 private randomly chosen colleges and universities. Data sources included general governance references, surveys of court decisions bearing on higher education, general histories, legislative statutes and constitutional provisions establishing public colleges and universities, charters for private institutions, pertinent decisions by federal and state courts, and journals and books published from 1880 to 1915. The most obvious finding was an affirmation of the legal distinction between public and private sector institutions. Findings showed that private boards benefitted from an institutional autonomy associated with their position as a private corporation, subject primarily to constraints in their charters (which were uniformly quite brief), to due process and reasonableness, and to governmental policies designed to maintain a governmental conception of the public good. Public boards varied from those for the eight or nine constitutionally established universities, which held a position conceived of as a fourth branch of state government, to the statutory colleges and universities that were bound to legislative will. However, except for the special situations that reached the courts, in general practice, public sector governing boards were accorded the position of relatively autonomous agencies staffed by members serving as private individuals rather than governmental officers. (CC)

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THE CORPORATE AUTHORITY OF GOVERNING BOARDS OF COLLEGES AND UNIVERSITIES AT THE TURN OF THE CENTURY: A REVIEW OF STATUTES AND COURT DECISIONS

E. D. Duryea, Professor
Sean Sullivan, Research Associate
Department of Higher Education
State University of New York at Buffalo

Occasional Paper Number Nine

Department of Higher Education
Faculty of Educational Studies
State University of New York at Buffalo

May 1981

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HE 014 414

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PREFACE

This is the third paper in our continuing series by Professor E. D. Duryea that has a historical theme. This paper also reflects Professor Duryea's long-standing interest in the role of the governing board in American higher education. This topic may seem arcane, but it goes to the hear of the uniqueness of the American academic system. In no other country is there such a complex series of organizational modes to ensure diversity in post-secondary education. As Duryea points out, the governance systems of both public and private higher education relfect a long and complicated history. This historical analysis combines an investigation of legal precedent as well as the broader aspects of the academic governance.

Professor E. D. Duryea is Chairman of the Department of Higher Education, State University of New York at Buffalo. He has written extensively on the role of collective bargaining in higher education and co-edited Faculty Unions and Collective Bargaining. His long-standing academic interest, however, has been in the history of American higher education.

Philip G. Altbach
Editor
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Universities and colleges in this country, with few exceptions, have been established as either private or public corporations authorized by state governments. This authorization has been conveyed by charter for private institutions and by statute or constitution for public ones, granting governing authority to a board of control consisting of non-academic, external members. And, while in practice during the last two centuries boards have delegated an increasing amount of actual control to presidents and administrators and to faculties, they have nonetheless remained the legally responsible body.

As a consequence of this governing system, and indeed as its original intention, institutions of advanced learning have performed a function deemed public in nature yet have done so as organizations separate from the agencies of public governments. In the course of time, however, the arrangement has supported two important characteristics of American higher education. On the one hand, boards have served to represent the public interest, either in general or as representative of special groups such as religious sects, to their institutions, even though at times their commitment may have been more to the "establishment" in society than to representation of a changing social order. On the other, their corporate status has enabled them to function as relatively autonomous entities in the sense of a buffer between the academic components of their institutions and the direct pressures of external political, economic, and at times religious interests. In neither component have corporate boards served perfectly, of course, but over time and across higher education they have maintained a balance, albeit an uneasy one at times, between responsibility and independence, or what currently is termed accountability and autonomy.

Boards have served as societal instrumentalities, so to speak, which have enabled colleges and universities to accommodate to social change and in the process maintain their viability as important institutions in society.

Culture and societal systems, however, change over time and the conditions of the latter half of the present century already manifest the possibility of modification if not serious alteration of this governing structure. Governments at both the national and state levels increasingly exercise supervision over broadening congeries of national life. For higher education it has become evident that federal control accompanies financial support and an increasingly significant role as monitor of social justice. Statewide coordination and supervision associated with efficiency in program development and in use of public funds draws public higher education into the web of public management. The financial requirements of private colleges and universities press these institutions to look for public support and thus to accept public oversight.

The study which this paper reports emanates from an interest in the American system for the government of higher education and a concern about its future viability. It has built upon a prior history of the corporate form as the basis for college and university government. It has examined the corporate authority of governing boards at the turn of the century -- from the 1880s and 1890s to World War I -- to establish a baseline which in turn can serve for evaluating changes in this authority resulting from the changing role of federal and state governments in higher education since World War II. For this purpose, the investigation relied upon four sources for its data:

general references which have dealt with the government of higher education and its relationships with federal and state governments, surveys of court decisions bearing upon higher education, and general histories of higher education;

legislative statutes and constitutional provisions establishing public colleges and universities and charters for private ones;

pertinent decisions by federal and state courts; and

journals and books published from 1880 to 1915.

The findings obtained from these sources were analyzed in the context of five substantive categories, as follows:

The formal corporate authority of boards which established their legal powers.

The control of educational program in terms of curriculum, admissions, and degrees or certificates for graduation.

The relations with faculty members in terms of personnel policies and internal decision making.

The management of financial affairs and physical plant.

The nature of relationships with students in terms of conduct and discipline, general rights, and due process protection.

The substantive categories are somewhat arbitrary, because the rules and policies set by charters, statutes, and the courts did not neatly fall into discriminating areas. This has led to some overlap in the analysis and discussion. However, in general the categories accurately represent the kinds of affairs with which boards had to deal.

The sample used included 17 public and 19 private colleges and universities chosen randomly within the constraints of a distribution based upon size, geographical location, and college or university status.

One major problem which did appear very early in the study had to do

with location and selection of pertinent court cases, especially because the digests for the period in question were not complete. Again, a somewhat arbitrary decision was made to use the following two: William Mack, Corpus Juris, 1917, and the Century Edition of the American Digest, 1900. Both of these references indexed the cases in categories appropriate for the study and contained informative notes and commentary. The cases examined, therefore, were derived from these two sources supplemented by several general discussions of the legal status of boards of control. The most fruitful of these latter were the following: Alexander Brody, The American State and Higher Education, 1935; Alexander and Solomon, College and University Law, 1972; and M.M. Chambers, The Colleges and the Courts, 1936.*

Finally, an important limitation on the scope of this study should be affirmed. The focus here is not upon the corporate authority of governing boards as such but the impact on this authority from legislative actions and court decisions.

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* The references, court cases, and institutions are listed at the end of the paper.

FORMAL CORPORATE AUTHORITY

Historically, the corporate form for university and college government follows a tradition in the higher learning initiated by medieval universities. Its essence in practice was that by becoming corporations medieval universities accepted an external sovereignty -- first that of the Papacy and later the secular kings as national states took form and gained power -- in return for which they protected their autonomy over internal affairs and gained protection from local town and church forces. This dualism of dependence upon external authorization and exercise of internal autonomy accompanied the higher learning in subsequent centuries. It carried over to this country in colonial times through English universities. Founding documents in America awarded corporate status to boards composed of external members rather than to academics as in English and medieval custom. This aspect of the original foundings followed arrangements used in Holland and Scotland, Trinity College in Dublin, and to a degree the Reformation schools such as the dissenting academics of sixteenth century England.

American origins for the founding of the colonial colleges did not make the contemporary distinction between public and private. All colleges performed a service regarded as public in nature, but colonial legislators preferred to implement it by means of agencies separate from government very much in line with their sense of the separation of church and state. Control of the colleges rested with boards composed of individuals who at first represented religious and later secular economic and political elites, as the nation itself became more secular in orientation and values during the nineteenth century. Corporate governing boards proved a viable

mechanism for institutional government in a changing social order.

As the nation entered the nineteenth century, colleges were not immune, despite their corporate status, from intrusions by state governments. Founding charters carried the same status as other legislative acts, subject to the right of the legislature to modify and change it, as indeed the Massachusetts body did to the Harvard charter in 1810 and 1812. Legal autonomy for colleges established by means of boards of private individuals was first explicitly recognized in the decision of the United States Supreme Court in the Dartmouth College case in 1819. "Reverence for property rights and concern that state legislatures might infringe those rights caused the Marshall Court to expand the contract clause into a constitutional shield for vested rights." (Stites, 1972, 99) This decision established legal doctrine, subsequently modified to a limited degree, for the private colleges and created a necessity later in the century for what became known as a public corporation by means of which state institutions were created under state constitutional or legislative authority.

Dartmouth College Case

John Marshall, in his famous 1819 decision, defined a corporation as "an artificial being: invisible, intangible, and existing in contemplation of law." (Trustees of Dartmouth College v. Woodward) Being a mere creature of law, the corporation possesses only those properties which the charter of its creation confers upon it, either expressly or incidental to its very existence. The corporation is the representative of the founder's rights, standing in the founder's place, carrying out the object of the trust as the founder would.

Marshall developed a distinction between two classes of corporations

in the course of his opinion which had not been recognized in previous law: (1) private eleemosynary and (2) public. Private eleemosynary corporations are founded by private individuals with private funds, taking private property for objects established by the donor which are unconnected with the governmental function. These institutions perform a function which would otherwise not exist. Public or civil institutions have been given a grant of political power or public property by the government to administer a governmental function. As Marshall states: "The character of civil institutions grows out of the manner in which they are formed and the objects for which they are created, the right to change them is not founded on their being incorporated, but on their being the instrument of government, created for its purposes." (Trustees of Dartmouth College v. Woodward)

Utilizing this distinction, the Chief Justice characterized the College as an eleemosynary institution and went directly to his famous assumption. "It can require no argument," he asserted, "to prove that the circumstances of this case constitute a contract." He then directed his judgment to two questions. "Is this contract protected by the constitution of the United States? Is it impaired by the acts under which the defendant holds?" He spoke affirmatively to both. Stressing the protection of the contract clause in the Constitution against legislative violations of the "right to property," Marshall found the College, as a private eleemosynary institution, "incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objectives of that bounty." Its trustees or governors were not public officers, or was it a civil institution "participating in the administration of government." The fact that the Colleges served a public object or function did not make the

corporation an instrument of government.

For the private colleges, the 1819 decision settled the question of their autonomy -- or, in the reality of legal opinion of that day, established this condition of autonomy. Along with businesses and other private enterprises they benefitted from a charter "once the jealously guarded gift of the sovereign, now. . . the judicially guarded 'right' of the subject." (Robbins, 1939, 180) Although specific rights and franchises could vary from institution to institution, Marshall identified certain fundamental powers required by private corporations to achieve their objectives. Among the most important were immortality or perpetual succession and the right to hold properties. The governing board was an individual at law, managing its affairs and holding property without the perplexing intricacies of perpetual conveyances as members of the board vacated their positions. Marshall stated: "It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations are invented and are in use."

In the practice of that time based upon precedent in English common law, the corporate individuality of the private governing board generally enabled a quorum of its members to exercise three fundamental powers: to contract and be contracted with, to sue and be sued and acquire, and to hold and dispose of property. For the colleges the contract power provided the legal vehicle to secure the resources necessary for the furtherance of the educational enterprise (the hiring of teachers, administrative personnel, the hiring of contractors, architects and construction workers for the erection of college buildings, etc.). The power of suit and liability to suit has enabled them to enforce contracts and be held

accountable to individuals and groups in situations where the board has neglected a legal commitment. Finally, the power to hold and manage property has enabled boards to develop physical plant and manage financial resources. These essential powers were protected by the decision.

However, the case did not provide unlimited autonomy to the governing board of the private corporation. Certain constraints on its power remained. Justice Marshall stated in the opinion that only those powers expressly provided by the charter or incidental to the corporation's very existence were to be attributed to the board in its daily life. Subsequent court decisions took a strict constructionist stance. This was summarized in a 1902 case, Blair v. City of Chicago, in which the court stated: "The principle is this, that all rights asserted against the State must be clearly defined and not raised by inference or presumption and, if a charter is silent about a power, it does not exist." More importantly, the Dartmouth decision "did not. . . rob the states of all regulatory power over corporations. It established some restrictions on state power with its rulings that certain powers must be granted a corporation to enable it to function and that a donor has the right to prescribe the uses of its charity." (Stites, 1972, 103) States retained the right of not only granting charters but of including reservations in the charters they granted. Within a few decades of the Dartmouth decision it also had become "common practice to insert reservation clauses in general statutes or in state constitutions and so make them applicable to corporations generally." (Stites, 1972, 103) The turning point in this regard was Ogden v. Saunders (1827) in which the Supreme Court decided that existing state laws become a part of the obligation of a charter. However, when it amends or alters the provisions

of a charter, "the state is still bound to act reasonably and in good faith and any alteration must be made consistent with the scope and intent of the grant." (Alexander and Solomon, 1972, 25)

A further constraint upon private boards appeared in connection with the 1908 case of Berea College v. Commonwealth of Kentucky. This is discussed in some detail in the later section concerning students. The decision holds pertinence in this regard that, despite the moral or constitutional question as to whether the State of Kentucky had the right to force separation of blacks and whites, a government's perception of the public welfare overrode the rights of a corporation. The Supreme Court upheld the legislation on the basis of the reserved power just discussed. The act in question was found to come "within the power of a state over its own corporate creatures." It did not "defeat or substantially impair the object of the grant" which was "to furnish education to all persons but which simply separates them by time and place of instruction."

The Dartmouth case, nevertheless, set legal precedent for the autonomy of private colleges as corporations. It led in time also to a distinction between private and public corporations and to the formation of public or state institutions. By midcentury, the practice of establishing state colleges by means of a public corporation, although by no means a legal necessity, had become a generally observed practice. States through constitutional provision or statute had adopted "the policy of delegating immediate responsibility to a special corporation, but . ... reserved for themselves the ultimate power of direction and control." (Brody, 1935, 112) Thus, although regarded in the legislatures and courts as agencies of state government, public colleges retained, in most of their

governmental features, the corporate structure and their boards retained managerial control over internal affairs.

The first statement of clear, unrestricted legislative control over a public university or college appeared in the 1818 founding statute for the University of Virginia. This read that the Rector and Visitors of the University "shall at all times conform to such laws as the legislature may from time to time enact for their government; and the said University shall in all things, at all times, be subject to the control of the Legislature." However, in general practice the emergence of the colleges as public agencies came later. The earlier state colleges, both before and after the 1819 decision, tended to resemble the colonial prototype. They were incorporated through special statutes which provided for governing boards consisting of private individuals, some even self-perpetuating. The courts, when such questions came to their attention, continued to regard the colleges as essentially private activities. Higher education was not regarded as a direct function of state governments, the practice of using public funds for this purpose was not established, and "the exaggerated influence of the decision in the Dartmouth College case caused many courts to apply the doctrines of that decision even in cases involving state institutions. (Elliott and Chambers, 1936, 116-7) Despite the precedent in Virginia, the concept of a truly public university did not gain general support until after the Civil War. Except for donations of land or permission to raise funds by lotteries or other means, state governments tended to leave funding to private donors and student fees.

However, when the concept of higher education as a public responsibility began to capture popular enthusiasm after the Civil War, governing forms for higher education were well set. The corporate idea proved a persuasive

precedent. By the turn of the century, the distinction between public and private was well established and confirmed by courts. In a report to the American Council on Education, Alexander Brody surveyed this legal evaluation and spoke to this point as follows:

> All higher institutions of learning are performing a function which is essentially public in character. There is no fundamental distinction between state or public universities on the one hand, and private institutions on the other, so far as their educational functions are concerned. Most private institutions are open to the public and are encouraged by the state for their useful contributions. In law, however, the status of an institution as public or private is determined by the locus of ultimate ownership and control.
>
> . . . . Ownership and control as the criterion of status is clear when the state assumes the educational function directly by creating an institution of its own in the form of a state university. . . . It is equally clear that the status of an institution is private when it is founded by private individuals, derives its support from private sources, and the ownership and control of which is in private hands. . . .
>
> Public support is to be distinguished from public control. . . . (1935, 79-80)

This distinction inhered in the decision of the Dartmouth College case which contrasted the situation for Dartmouth with that for an institution in which the property held by the corporation "is altogether the property of the State, . . . the corporators have paid and done nothing amounting to a valuable consideration for the act of incorporation, [and] . . . there is no contract upon valuable consideration between the State and the corporators." This condition constituted "a public, not a private corporation." (Alexander and Solomon, 1972, 73)* Brody in the report

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* This question was addressed by the United States Supreme Court in Trustees of Vincennes University v. State of Alabama (1852) in which the Court indicated that public or private status depended upon analysis of the founding document and method of establishment, support, and control.

referred to above discussed the relationship between public corporations and state government in his chapters V and VI.

> State universities as public institutions for higher education fall within the same category as other public corporations organized for political and governmental purposes such as municipal corporations (cities, towns, counties) or quasi-municipal corporations (official boards, school districts). Broadly speaking, when the state assumes the function of higher education, the corporation created for that purpose becomes as much a part of the sovereignty of the state as citizens, counties, and other political sub-divisions. (Brody, 1935, 95)

However, Brody further points out, that while universities are agencies of state government, they are of a special kind, i.e., administrative. Even within this category, colleges and universities possess a distinctive role from other administrative units: they do not engage in what amounts to the political supervision of a district such as school boards do, they are not established under the police power of the state such as regulatory agencies are, and they differ from agencies concerned with charitable, penal, and corrective matters. State universities in fact hold extensive control over property and administration of funds, over internal organization, and over private legal relations on behalf of the state. In this sense, public governing boards receive many of the prerogatives and responsibilities associated with corporate existence.

> Control of property, distinguishing, however, between that which belongs to the institution as such and that which they manage as agents of state government.
>
> Power to contract and be contracted with, subject to the distinction between affairs and monies in which they act as agent of the state and those in which they hold a proprietary interest.
>
> Administration of funds in terms of the fiscal management of the institution, subject always to regulations governing state finances, but with considerable autonomy for monies derived from non-governmental sources. Courts reviewing this function tended

to view the corporation as a convenience by means of which the state implemented the purposes of higher education.

Right to sue and liability to be sued, within which the immunity from liability normally an attribute of public government has intruded complications. A safe generalization restricts this condition to transactions related to corporate business but not where the property or interests of the state are directly involved.

Power to borrow money, subject to limitations imposed by statute and state policies.

Power to enact governing rules and regulations and maintain "scholastic discipline" which in general is more implicit in the nature of the corporation than explicit in statute or constitution.

Power to engage and discharge faculty members and administrators which in the final analysis has undergone modification in terms of the practice of many states to view such persons as public employees.

Right to charge tuition and incidental fees as part of the financial management of the institution yet subject to state policies regarding free or low-cost admission. Again, as above, this power has been interpreted in terms of the management of properties and activities not considered directly a part of the state's provisions.

In the public sector three types of relationships between state governments and public higher education materialized during the nineteenth century. About a third of the state institutions fell in the University of Virginia pattern, in that they were founded by statute upon legislative initiative and thus totally subject to legislative control. Another group owed their existence to statute but statutes which responded to a constitutional requirement which ascribed a few general provisions such as location and arrangements for selecting members of the governing boards. In nine states, universities were established by constitutional mandate as independent agencies of government. The idea of constitutional ascription arose in Michigan in 1850 following dissatisfaction with political intervention into University affairs. That institution was placed

under a Board of Regents elected by the people on the basis of judicial circuits in what amounted to a fourth branch of government. In all, "twenty-seven states make explicit reference to higher education in their constitutions. The remainder of the states, through exercise of policy powers, have legislatively provided for higher education." (Alexander and Solomon, 1972, 26) Of the states with constitutional provisions for higher education nine guaranteed constitutional autonomy for their universities (Michigan, Minnesota, California, Georgia, Idaho, Oklahoma, Colorado, Nevada, and Arizona). "In these states, the constitution elevates the university above the condition of a mere agency of the legislature and places it in a position of pre-eminence in the state's legal structure." (Alexander and Solomon, 1972, 26)

In concluding this section, it is appropriate to return to the key element in this description, the Dartmouth College case, because it set the basis for the public-private dichotomy which became evident after the 1850s and served as the major focus for the analysis in this paper. This case clarified the legal exercise of powers by corporations and their relationship with state government, and it established a legal framework for later conceptions of the exercise of corporate authority. More pragmatically, the decision focused evaluation of corporate performance upon the achievement of the will of the founder. In this sense, it protected boards from external intrusion in the absence of malpractice or inability to meet the founder's purpose. Legislatures were barred from significant control of what the case defined as private corporations and thus in time they created a new form of corporation, the public corporation. This latter corporation has held a special status, in part one which allowed

the exercise of the traditional corporate powers and in part one which defined it as an agency of the state government. Its founder was the state itself which also provided for its perpetual succession by means of the selection of succeeding board members who served for specified terms. Even within the relative autonomy of constitutional creation, status as a public corporation required considerable integration of colleges and universities with the administrative system of state governments and certainly a legal or financial dependence upon the legislature.

These basic corporate distinctions underlie the following discussion that examines four essential functions for which college and university governing boards are responsible.

EDUCATIONAL PROGRAMS: CURRICULUM, ADMISSION, DEGREES

At the turn of the century, the conception of college and university purposes had begun to broaden. The traditional intention of the early colleges to offer "a learned education for youth" and "instruction in the learned languages and the liberal arts and sciences" persisted, clearly enough, as a tenet for undergraduate study, but did so increasingly in a relationship with the development of specialized knowledge and a commitment on the part of the expanding land-grant colleges and emerging universities to the application of knowledge and its usefulness to the general society. By 1900 graduate study had become a major concern for the leading universities and had begun to set standards for faculty service. Research had become a central function for these institutions. In the words of Laurence Veysey, ". . . the American university of 1900 was all but unrecognizable in comparison with the college of 1860." (1965, 2)

It serves as a commentary on the role of governing boards that this change in the character of higher education did not rely upon explicit authorization in either charters or legislative statutes or in court decisions related to colleges and universities. One has to assume that broad corporate powers associated with the function of boards allowed a governing flexibility necessary for accommodation with developments in knowledge and in society. A perusal of charters for private institutions, for example, discloses only limited reference to the nature of their educational programs. Most charters were quite brief, primarily making provision for the membership

and general powers of boards.* In the public sector, while educational purposes appear with far greater frequency, they were couched in terms of general programs for undergraduate and, occasionally, professional studies and the right to grant appropriate degrees and diplomas.

Although statutes for public institutions included more detail than did charters, yet despite an occasional lengthy prescription for the management of institutions, more than one-third failed to delineate the character of educational programs to be offered. This was modified in some instances by reference to a "normal department," reflective of a concern for the preparation of public school teachers or, as in the Nevada constitution, to educational and other services related to mining (an obvious concern in that state). Of the statutes which did explicate educational programs, that for Arizona stated it most fully by providing for five departments: science, literature, and the arts; theory and practice in elementary instruction; agriculture; normal; and minerology and mines. The University of Oregon statute required that that institution "provide instruction and complete education in all the departments of science, literature, professional pursuits, and general education." The 1870 University of Iowa statutes (superseded by provision for a central state board in 1909) specified "courses of instruction and elective studies, as the Board of Regents may determine." On occasion, a professional area other than education was

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* A notable exception, the founding documents for Stanford University identified it as a seminary of learning of "the highest grade, including mechanical institutes, museums, galleries of art, laboratories and conservatories" and make reference to both subjects of study and the purpose of qualifying students for "personal success and direct usefulness in life."

mentioned, such as the 1908 statute for the University of Kentucky which designated programs in law, medicine and surgery. The most complete prescription uncovered in the study was an 1891 statute for the Territory of Oklahoma which specified that the "immediate government" of the several colleges was entrusted to the faculties but which provided that "the regents shall have the power to regulate the course of instruction and prescribe the books or works to be used in the several courses, and also to offer such degrees and grant such diplomas as are usual in universities or as they shall deem appropriate."

One has to assume that educational purposes were "givens" for an institution having the name college or university, especially in the private sector, and as a consequence trustees or regents had considerable latitude in planning -- or approving faculty and presidential initiative, as was more typical in practice -- educational programs demanded by the expansion of knowledge in the latter part of the nineteenth century. A few interesting deviations from this generalization came to light in the course of the study. The state code of 1910 for the University of Georgia, for example, imposed a duty on the trustees to encourage and promote "the regular course of Bachelor of Arts" so that it could not be subordinated by other programs and also required support of two literary societies in order to foster "orato and composition among the students." Ohio legislation in 1870 empowered the board of what is now Ohio State University to "secure a collection of specimens in minerology, geology, zoology, botany and other specimens pertaining to natural history and the sciences" and further ordered it to make provision for increasing and maintaining these collections.

In another dimension, commitments to sectarian and political freedom

in charters and statutes did come to light. These appeared frequently, although by no means universally, in provisions for both private and public institutions. In the private sector, for example, Mrs. Leland Stanford used powers given to her by the founding grant for Stanford University to require that it be "forever maintained upon a strictly non-partisan and non-sectarian basis." An 1857 amendment to the charter of Washington University specified that no instruction "either sectarian in religion or party politics" was to be allowed. The 1837 charter for Knox (then Manual Labor) College required that it be "open to all denomination of Christians." Bucknell University's founding grant of the same year forbade "religious sentiments" as a criteria for the choice of teachers and the admission of students. Despite its association with the Methodist Church, Wesleyan University in Connecticut was established with a similar restriction.

As appropriate for a public college or university, founding statutes frequently explicitly forbade the use of sectarian tenets and, occasionally, political convictions or affiliations in the admission of students or employment of staff. A typical example of this restriction appears in the 1876 statute of the University of Oregon which stated that "no political or sectarian test shall ever be allowed or applied." The New Mexico code of 1915 contained a similar provision. The 1870 statute for the University of Iowa prohibited the "exclusive control of one denomination." In all, two-thirds of the acts for public colleges and universities made specific reference to the prohibition of sectarian affiliations or beliefs as criteria for admission or staff service; a few also included political criteria. However, one senses that public polity made such freedom a factor whether specified or not.

A similar prescription existed among public institutions with regard to the admission of females. Nearly two-thirds of the statutes required boards to admit women students; in no instance was a board prohibited from admitting women. This is in line with the commitment of public higher education during the late nineteenth century to an expansion in educational opportunity on a sex as well as a socio-economic basis.*

A different situation apparently existed for the private sector in which governing boards held far greater authority over internal affairs and were free from direct oversight and control by state governments. In any event, the research for this study did not uncover court cases which dealt with admission to private colleges; their charters did not direct boards concerning whom to admit. A major exception, of course, lay with the fact that most private colleges in the nineteenth century admitted male students only. Several, such as Barnard at Columbia University and Radcliffe at Harvard University, existed as coordinate women's colleges; and after the Civil War a number of women's or "female" colleges were founded. The rights of women to enter men's colleges or vice versa did not become an issue. The major exception, incidentally, in the private sector was Oberlin College in Ohio which admitted in 1837 "four female freshmen and thus inaugurated coeducational higher education for women." (Rudolph, 1962, 311)

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* As a footnote to state government control of admission policies, we examined the founding statutes for state colleges in the South for reference to blacks or negroes. Statutes for institutions included in the sample for this study did not mention restrictions based upon race, with one exception. With reference to branch campuses the statute for the University of Georgia stated that these campuses "shall be open to all white female students of proper age and qualifications."

A third aspect of the educational program in which board authority was restricted to some extent involved the award of diplomas and degrees. Clearly, this power resides in the essential purpose for which institutions and their boards existed, as a culmination of the educational programs which implemented their corporate mission. With a few exceptions the charters and statutes contained articles or clauses which confirmed this authority, and the exceptions in fact did so implicitly by specifying the nature of their educational programs.* The restrictions upon this authority were of two kinds, neither of a critical nature, although both of importance for boards in the exercise of their responsibilities. One appeared in about a third of the charters and statutes and in several court decisions and recognized a role for faculties in recommending recipients for the degrees. The other appeared in court decisions responding to suits by students and imposed upon boards, and presidents as their agents, an obligation to assure fair treatment of students and protection from arbitrary actions, which will be discussed in a later section on students.

The formal recognition in statutes and charters of a faculty role in the granting of degrees anticipated what became more customary practice as the twentieth century progressed. Yet, prior to World War I a number of presidents of major universities had publicly admitted to a reliance upon

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* Of interest in this connection were several court decisions which made it clear that the power to grant degrees must be either expressly conferred or clearly implied. As frequently the case, the rulings of courts in this regard emanated from disputes over private medical colleges (as in Townsend v. Gary, 62 Vt. 373, 1890) where the court responded to the need to assure adequate professional standards, or as in an early New York State case (People v. Geneva College) where the institution used its charter intended for one location and purpose to initiate a medical program at an entirely different location.

faculty members for advice on academic affairs. In his 1917 annual report, President Nicholas M. Butler of Columbia University, for example, recognized the role of faculty members in the development of educational policy. (Elliott, 1932) In a 1912 article in Science, President Jacob Schurman of Cornell acknowledged that "the supremacy of faculty in all educational matters had been maintained for a score of years." (703) A similar assumption was voiced to a national conference of trustees in 1905 by Trustee James B. Munroe of the Massachusetts Institute of Technology. (Munroe, 1913, 465) To a high degree, such comments as these reflected the changing status of faculty members from tutor and teacher to professional and specialist and the growing complexity of institutions which removed board members from personal contact with internal affairs.

Limited formal recognition of faculty primacy in determining the award of degrees by charters and statutes in a number of institutions did anticipate the latter practice of governing boards and president to delegate this prerogative. In this context it did impose some limit over the corporate authority. Among the public institutions, the statute for Indians was most explicit in this regard, authorizing the faculty to confer degrees "with the consent of the trustees." The statute for the University of Oregon gave the board authority to grant degrees only "on the recommendation of the faculty." At Bucknell, the charter awarded the power to grant degrees to the president and professors who constituted the faculty. At North Carolina the President and professors held this "by and with" consent of the trustees, while contrariwise at the University of Arizona the board held the power to confer degrees "under the advice of the professorship."*

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* In contrast, the 1831 charter for Wesleyan University granted the Preside power to grant degrees "as approved, by a majority of the faculty and a majority in the board of trustees and visitors." However, a change in 1907 deleted mention of the faculty.

Courts have upheld faculty expertise in this connection, generally refusing to replace with their judgment that of the faculty and institutional authorities, "even where the faculty has acted in bad faith by refusing to make such a recommendation." (Mack and Hale, 1917, 985) This was maintained in cases involving professional schools such as medicine and law.

The Colorado Supreme Court in a 1902 case wrote the most extreme decision in support of faculty prerogatives. (Steinhauer v. Arkins) Responding to a student complaint of faculty malice and enmity by the administration in an examination required by the trustees as a basis for graduation, the court postulated that the school, the Colorado School of Mines, awarded its diplomas through the trustees. But it went on to reason, that "the board has no power to issue a diploma except when required to do so through the school, speaking through the faculty." Thus, it stated, the trustees are "bound by the judgment of the faculty." This opinion, as Elliott and Chambers commented, offered a different view than then prevalent, that "in legal contemplation, the governing board is the institution." (1963, 42)

Limitations on board authority inherent in the educational expertise of the faculty will come under review again in a different context, that of student rights as they were subjected to court review.* As in the cases just cited, the courts recognized to some degree faculty role in decisions in the conferring of degrees, but as part of a process within an institution for which the board and its agent, the president, spoke.

In summation, this review of the nature of board control over the educational function of colleges and universities in the first decade of

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* This is discussed in a later section.

this century uncovered evidence of only very limited formal restriction on their corporate authority. Granted, that in some instances the scope of educational programs was prescribed by charter or statute and that boards of public institutions faced legislative instructions to avoid sectarian and, in many instances, political indoctrination. But these prescriptions constituted relatively narrow constraints. The real impositions upon a board's exercise of its corporate authority lay elsewhere, in the changing nature of higher education. Institutions were becoming larger and more complex. As a consequence, board members found themselves more removed from the affairs of their campuses. In the process, the professor was becoming increasingly a specialist and an expert; and, as such, his sense of his worth as a professional was heightened. More significantly even, the educational endeavor itself fragmented into increasingly esoteric departments. (Duryea, 1978) As one trustee explained, he and his associates found "less and less opportunity for usefulness in a machinery so elaborate that any incursion into it by those unfamiliar may do infinite harm." (Munroe, 1913, 465)

FACULTY RELATIONS

As was the case for educational programs, the constraints upon board corporate authority associated with the position of faculty members reflected changes taking place in higher education at the end of the nineteenth century. In the major universities, size and academic specialization had begun to impose restrictions in fact if not in law upon what boards could or could not do. The sense of this condition was expressed by historian Edward Cheyney, writing about his own institution, the University of Pennsylvania, in 1915. He raised the question as to how the board of trustees could evaluate each of the four hundred or more faculty members employed at that campus. Responding to similar considerations, President Schurman of Cornell in 1912 acknowledged the necessity of faculty input into decisions affecting educational affairs despite the fact that trustees held the reins of power and exercised final legal control.

Nevertheless, for the period covered by this study faculty in general held the status of employees of boards with very limited formal role in policy determination. Charters and statutes of incorporation, with few exceptions, assigned boards full control over internal affairs as an integral aspect of corporate status. When challenges to board authority arose, courts responded by a strict interpretation of founding documents within a framework of the doctrine of nonintervention into internal affairs. Some modification of this appeared in several court decisions which recognized a contract in faculty appointments and a modicum of due process in dismissal actions.

As in other aspects of the corporate role of boards, the major distinctions lay with the private as against the public status of an

institution.

Private Colleges

Charters of private institutions created authority for the employment or dismissal of all personnel, including faculty members, either through the basic corporate power "necessary for carrying into effect the purposes of the institution" or through the explicit right "of electing or appointing the president, professors, tutors, and other teachers of the university." The only restraints upon this authority which emerged were, one, an exceptional situation in which the founders retained visitorial powers and, a second, the view in several court decisions that employment agreements held contractual implications.

The charter for Stanford University awarded to the founders, Senator and Mrs. Leland Stanford, the right to alter its provisions. It was exercised by Mrs. Stanford following the death of her husband in connection with the role of the president of the University. The original charter of 1885 gave the board authority to employ faculty members but not to dismiss them, a responsibility left to the president. In 1897, Mrs. Stanford amended the charter to reinforce this presidential responsibility by explicitly stating that decisions on faculty removal were to be "determined by the President and by him alone." (Stanford University, 1971, 13) However, in the aftermath of events following the famous case of economist Edward A. Ross who was dismissed from the University on her insistence, Mrs. Stanford in 1902 modified her stance in this regard and assigned to the Board at least a general overview of employment practices. Shortly, thereafter, she withdrew from involvement in University affairs, and in 1905 authorized the board to assume "all the rights, powers, privileges and duties which otherwise devolve upon or vest them upon my death in the

terms of the charter]." (Stanford University, 1971, 26)

In any event, the Stanford situation both lacked precedent and failed to establish one. The significant challenges to governing board authority came from another source: from challenges on the part of dissatisfied professors who perceived unnecessary and illegal infringements of their rights. In resolving such conflicts, courts adhered uniformly to a strict construction of board corporate authority and the position of faculty members as employees of boards but did acknowledge in some instances that appointments were at least partly contractual in nature.

Two cases dealt with the status of faculty members as employees. In one, regarding the charter of the University of Lewisburg, a Pennsylvania court concluded that "professorships created by the trustees for the purpose of accomplishing the objects of the act of incorporation are not in any proper sense corporate officers, merely agents or employees whose services may be dispensed with whenever the interests of the institution, in their judgment, demand it." (Phillips v. Commonwealth) A similar line of reasoning appeared in the context of the in loco parentis responsibility of boards in a 1914 case in Missouri. (Darrow v. Briggs) The court held that professors were responsible to trustees for student moral welfare and supported the right of the board to dismiss the plaintiff who belonged to a non-traditional religious sect and thus was in conflict with appropriate moral standards which the board felt an obligation to maintain.

Nevertheless, in cases prior to 1900 the idea that an employment relationship could be viewed as contractual did emerge and presaged some limitations upon board authority. In the first case, Illinois Female College v. Perry (1880), the faculty member refused to teach because the College failed to provide a room in a location previously agreed to and sued for

breach of contract. While refusing to uphold the plaintiff, the court nonetheless did recognize a contractual nature in the appointment. Its decision read in part:

> The assignment of a room is a matter of favor not a right under the terms of contract. Failure to report and unfavorable conduct in failure to discharge the teaching duties of the contract is inexcusable and the contract is thereby rescinded.

This interpretation appeared also in an 1887 action by a professor seeking salary due on the basis that he had performed services and that he was advertised in the institution's catalog for these services. (Tyler v. Trustees of Tualatin Academy and Pacific University) The Oregon court involved upheld the employment as contractual even though no formal board action had been taken. It reasoned that the board had authorized the issuance of the catalog which served as proof of employment. In the 1897 case of Nebraska Wesleyan University v. Parker a court again recognized the contractual nature of an employment agreement between the plaintiff and the Chancellor of the University, although it did not find the board as a body obligated to implement a contract which it had not formally approved. The question lay not with the existence of a contract but with the right of the Chancellor to authorize it without formal board resolution. Parenthetically, one wonders about the interests of the employee in this situation. In contrast to these decisions, it should be noted that as late as 1909 another court upheld the unrestricted authority of a board, this time in terminating the services of a dean on the grounds that the trustees were "responsible only to the founders and patrons [of the college] and to their own consciences." (Brookfield v. Drury College)

Public Institutions

While in general corporate authority in the public sector conveyed the same powers as that in the private, courts did view public boards as agencies of state governments. Except for the constitutionally-based universities, this conception sustained boards in their relationships with faculty members but left both subject to legislative surveillance and direction. To the limited extent that they dealt with faculty relations, founding documents affirmed this view of board authority. Court decisions which bore upon the question similarly maintained the status of faculty members as employees and the right of boards to deal with them as such. The idea of appointments as contracts did not enter into cases involving public institutions in the same manner as it did for the private, because of legislative sovereignty.

Regardless of legal constraints, however, in practice boards did manage the affairs of their institutions and in this connection handled personnel affairs related to faculty members. The common practice in founding documents was to assign this prerogative explicitly to trustees and regents. One typical example was the 1887 statute for the University of Arizona which read that "the board of regents shall have the power to remove any officer or employee connected with the institution other than the chancellor or member of the board of regents when, in their judgment, the interests of the university require it." The 1899 statute for the university in Arkansas stated that the "board of trustees shall fix, and from time to time regulate the fees, allowances, salaries and wages to be paid architects, inspectors, professors, teachers..." One exception was a provision in the Nevada constitution which, for reasons not made clear, specified that the

president could employ assistant teachers, a minor aberration depending upon the nature of such employees.

It is interesting to note in the context of the professionalization of professors after the turn of the century and the formation of the AAUP in 1915 that at least two statutes recognized board obligation as well as authority in this regard. A 1905 revision of the North Carolina founding statute required that the removal of professors should be "contingent upon misbehavior, inability or neglect of duty." A 1911 Nebraska act included the following statement:

> They [the Regents of the University] shall have power to remove any professor or officer, but only upon the proof of written charges, and after affording to the person complained against an opportunity for defense.

Although not usually invoked, state legislatures could rescind or contravene board decisions related to employment of faculty members, on the basis of an explicit clause "subject to law" or an implicit assumption by the courts of this condition. A number of court cases dealt with the question, but decisions in them followed from a 1873 opinion of the United States Supreme Court in Head v. The University of Missouri. The case involved the removal by legislative action of a professor during the course of a six-year term of office awarded to him by the Curators of the University. The Court determined that the university was indeed public and "State owned" and that the appointment had included the provision "subject to law." It determined that the "plaintiff accepted his office subject to the laws then in existence and subject to the passage of such subsequent laws as should seem wise to the legislature." It concluded that it was "a part of the contract that the legislature could. . . bring it

to an earlier end."

Three subsequent cases reinforced this position. In an 1894 case involving the regents of a normal school a state court upheld the right of the board to "remove at pleasure" when the interest of the institution was at stake. Referring to the Head decision, it reiterated the prevalence of law over board agreements, in this case implicit rather than explicit. Speaking to the point, the court commented that "the board of regents could make no by-law or contract by which this power could be bargained away, limited or restricted." (Gillan v. Board of Regents of Milwaukee Normal School) In an 1899 case, the supreme court of Arizona found that the regents of the university there lacked authority "to bind themselves" for three months or any other time in making appointments." (Devol v. State Board of Regents) Finally, in a 1901 determination of Arkansas upheld the same view of legislative authority, describing the university as a state institution and "instrument of the state." It sustained the power of the legislature over a public agency. (Vincenheller v. Rea

The Vincenheller case, however, involved a faculty member who served as a vice director and pomologist under funds awarded by federal legislation, in this case the Hatch Act. Thus, it rested also upon a distinction between the status of a faculty member as an employee and that of Vincenheller as an officer. In the view of the court, he was an officer of the state government and not "a mere employee under contract." In this situation the court carried forward precedent in an 1873 Wisconsin case, Butler v. Regents. The latter court did not view "a professor in a university [as] a public officer" but as an employee in the same manner as a teacher in a public school. Another 1901 decision in West Virginia, Hartigan v. State

Board of Regents, by the state supreme court made the same point. The court upheld that Hartigan was not a public officer but an "employee of the board" which could remove its employees at will.*

In general, courts held that boards did in practice have substantial and final authority in regards to the employment and dismissal of faculty members and demonstrated a reluctance to intervene in internal affairs. This situation was confirmed in the 1901 West Virginia case just referred to in which a professor of anatomy claimed that he deserved notice from the board prior to the decision to terminate his services so that he would have time to prepare his defense. The court found the faculty member subject to removal at the pleasure of the board. A similar point was made in the Gillan v. State Board of Regents case, also just discussed, in which the court found as follows:

> The teacher employed at a normal school may be dismissed at its [The board's] pleasure before the termination of his contract, . . . the exercise of such power thus granted cannot be questioned by the courts, where no abuse is shown.

Interestingly, in this case the court did at least refer to the possibility of a restriction upon an abuse of power, although it noted that the present action was "not questioned as an abuse of the discretion of the board." The other two cases which dealt with this situation followed the Gillan decision regarding the complete power of boards of state institutions to

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* It should be noted in this connection that a court in Nebraska did modify this stance to some extent in 1923. (Eason v. Majors, 196 NW 133) This decision gave recognition to the special nature of teacher (in a state normal school) as holding an office "public in character."

terminate the services of faculty members as employees when in conformity to state laws. (Ward v. Regents of Kansas State Agricultural College, 1905, and Hyslop v. State University Board of Regents, 1913)

One case tried before the supreme court of Kansas in 1878 did lead to a decision which at least suggested some limitation upon the will of boards in this situation. The board had adopted a resolution that professors "shall give and receive three months' notice of resignation or discharge, except in cases of gross misconduct." Mudge, a professor, was terminated without notice. The court upheld the application of the resolution to Mudge on the grounds that it constituted a contract and concluded that "we know of no sufficient reason why such a contract should not be valid." (Board of Regents of the Kansas State Agricultural College v. B. F. Mudge) However, the study disclosed no other cases which supported this interpretation. Although reference to employment arrangements as contractual did appear in several decisions, courts did not sustain employment as an agreement between equals. Rather, in line with the preceding paragraph, the typical posture was that of Gillan v. Board of Regents in 1894 which stated that the "power of summary removal of a teacher, vested in the board by statute, is a discretionary power, and its exercise in any given case cannot be inquired into, or questioned, by the courts."

Summing up this section in the context of a prior study of faculty-governing board relations from 1900 to 1969 (Duryea, 1978), it is interesting to note that with a few exceptions the courts did not anticipate even in the later cases (with the possible exception of Mudge) a changing conception of the position of faculty members. That study concluded that by the 1920s the organizational pattern of American higher education had

taken its current form which combines a bureaucratic administration structure with a collegial pattern for academics supporting their involvement in academic affairs -- at least in the major colleges and universities. Recogniti of faculty members as professionals and therefore participants in educational decisions go back to the 1890s in such institutions as Cornell and Columbia universities. As early as 1905 President Eliot of Harvard noted that the "real direction" of educational affairs "devolves upon professors and other teachers." (Duryea, 1978, 8) One is led to suspect that on the whole the courts reflected the existing laissez faire philosophy based upon a conception of employment as a voluntary arrangement between equals, employees and employers. An illustration of this, reasonably typical of the attitudes of the courts, appears in Brookfield v. Drury College in which the court notes that the law "has been well stated that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will, and may be terminated by either party at any time." However, it is interesting to note some recognition of an employment agreement as a contract and at least an occasional reference to due process and abuse of power, which does suggest a limitation upon board authority which has become more prevalent in the course of this century.

FINANCIAL MANAGEMENT

In a review of the role of the governing board of Columbia University, a committee of trustees in a 1957 report identified three major functions: the selection of the president, the general overview and approval of "the kind of education offered," and final responsibility for the acquisition, conservation, and management of funds and property. (Columbia University, 20) Of the three, since the presidential search normally comes at extended intervals, the area of financial management emerges as a major area of board action. It was and is not only essential to the corporate responsibility for the maintenance of the institution but an area in which board members tend to have their greatest expertise and experience and therefore most confidence. Certainly this was a central concern for boards of private institutions and one in which their authority is least challenged or impinged upon. This condition held also for public institutions at the turn of the century, well before state legislatures and governors had begun to exercise the kinds of budgetary and audit controls which have characterized the decades of the 1960s and 1970s. Except for restrictions associated with land-grant support, which was limited with few exceptions to state colleges and universities, the federal government had not begun to provide any major financial support or to exercise the controls which have accompanied this support in later years.

Thus, one might expect that prior to the first world war governing boards in both the private and public sectors managed the financial affairs of their institutions with a minimum of restraint. Indeed, the investigation for this study substantiated such a generalization. The brevity of charters

for private colleges and universities left boards wide latitude in the matters of financial management. Concurrently, as the histories of this era indicate, in general legislatures were content to allow boards to manage public institutions with minimal instructions other than for specific situations in which local politics or crises generated strong sentiments, especially when concerned with the conduct of faculty members or students. Nevertheless, legislatures did have, as discussed above, complete authority over the conduct of institutions established by legislative act. This power did extend into internal affairs, especially where public funds were involved. As one reviews charters, statutes, and court decisions the limitations upon boards appeared in two general areas: that associated with the acceptance and management of funds and properties and that associated with tuition and fees.

In the public sector, it should be noted, statutes did frequently require annual reports which, while they imposed no legal restrictions, did undoubtedly inhibit board freedom as the consequence of the potential for review by governmental agencies and officials. Some statutes required reports to the governor and others to the superintendent of education for inclusion in his report, usually to the legislature. In Arkansas this report went directly to the legislature. Such reports usually conveyed, as in Oklahoma, the progress, conditions, and needs of the institution and data upon enrollments and faculty and upon receipts and disbursements. In some instances, statutes required a summary of the proceedings of the boards or the submission of the recording of their meetings.

Funds and Properties

The differences between private and public institutions proved

sufficiently significant to warrant treating them separately, the former being almost entirely autonomous from external constraints and the latter exhibiting a special involvement of governmental interests which set precedents for the more recent extension of budgetary and other financial controls.

Private. In reviewing the status of boards of private institutions, it is important to reiterate the previously considered distinction between control and function. While free of legal control over internal affairs on the part of state governments, private colleges nonetheless serve a public function. As Elliott and Chambers have stressed, private educational institutions "hold all their property and funds in trust for public educational purposes." (1936, 380) Their tax-free status confirms this view. In the context of this responsibility to the public interest, it is interesting that our study revealed very limited restriction upon the corporate authority of private boards in their control over financial affairs. Funds and properties at their disposal, as councils of self-perpetuating private individuals, had a public purpose which neither charters nor court cases accentuated. In fact, where the issue of control of funds and properties did reach the courts, decisions consistently upheld the authority of boards. In a case involving Yale University, for example, the court supported the corporate right to acquire, possess, and manage property and thus to invest funds in notes, bonds, and mortgages as its judgment prescribed. (Cass v. Yale University) This case confirmed an 1891 Kentucky court of appeals decision which upheld the right of the board of a "private literary corporation" to make a contract which included a donation of funds to a railroad company in order to assist in a construction

which they believed would benefit their association. (Louisville Railroad Company v. St. Rose Literary Society)

Restrictions upon board freedom of action in this area sprouted from concerns associated more closely with internal fiscal management and the interests of donors, both matters of a more private than a public interest.

In the area of financial management, as for other board functions, however, trustees had only to adhere to whatever restrictions their charter or founding statutes imposed, which in total effect were quite limited if not negligible. Arrangements made with state governments subsequently carried a contractual connotation serving primarily to protect board authority, although they did impose some constraints, binding boards as well as the legislatures. This was affirmed, for example, by the supreme court of Louisiana in 1914. A ruling protected the interests of an institution in the ownership of property deeded by the legislature. At the same time the court recognized the obligation of the institution, having accepted the property, to conform to the requirements of the statute involved. (State v. Centenary College) This decision conformed to another four years earlier which upheld the lease of land under legislative approval as a contract which bound the state as well as the institution. (State v. Tulane Education Fund)

Two types of restrictions upon the freedom of boards appeared in some of the charters. One of these restrictions had its origins in medieval England in what were called the Statute of Mortmain in 1279, an enactment designed to limit the large holdings of the

church. For reasons not entirely clear the mortmain restriction carried over to the early colleges in this country. In keeping with this conception, the Syracuse founding charter of 1887, for example, limited its holdings of "any real or personal property and estate whatsoever" to five million dollars. The 1865 state for Cornell University had a similar provision which specified "an amount not exceeding three million dollars in the aggregate." At Wesleyan the restriction had a somewhat different motivation, setting the amount at six thousand dollars in property held within the state as a consequence of its tax-free status. According to Elliott and Chambers the mortmain principle appeared in the general laws of several of the original states, including Massachusetts, New York and Pennsylvania. (1936, 383) However, the courts tended to construe these laws liberally in favor of the colleges, and legislatures tended to enlarge the amounts when needed. There was no clear evidence as to when this principle disappeared, although it does not appear as a factor in this century. In any event, mortmain requirements failed to carry over to the newer Western states.

A second form of fiscal control in founding charters had to do with the use of permanent funds or endowments, requiring that boards protect the principal and apply all or part of the proceeds from them to solely designated usually, educational ends. The Bucknell charter stipulated that at least twenty-five percent of all monies and property capable of producing revenue "shall be placed out on interest" and the revenues used exclusively and forever to support the institution. This charter prohibited the mortgaging of property and debt obligation for which the board did not have the clear means of paying back. The Syracuse charter and that of Wesleyan University protected endowments or permanent funds and donations, allowing only the use

of interest or other income for current expenses. But even this type of restriction applied to a small number of the institutions in the sample. More generally charters proved silent on the matter or expected that, as in the case of Beliot College, "the Board of Trustees shall faithfully apply all funds by them collected or received, according to their best judgment."* The general corporate authority to take hold and manage monies properties stood without significant modification.

Finally, boards were bound by legal restriction on the use of funds given as a charitable trust, as against those received as gifts without restrictions In this sense, when colleges received funds donated as trusts, they accepted the gift with the "trust strings attached." (Alexander and Solomon, 1972, 266) Under such circumstances, boards representing their institution, accepted responsibility for the supervision of a trust for which they were in effect the beneficiary; they were bound to use the funds for purposes which the donor specified in the award of the gift. An extreme example of this appeared in a 1913 decision of the appellate court in Maryland. Land granted to a college in an 1830 deed carried with it the commitment that it be used for "the education of pious young men in the Catholic persuasion" and that the land serve as "seat and location" of the college. As a consequence of a 1911 fire, the college was rebuilt upon a different location. Heirs sued for the property and won the award of a jury in the original trial, a decision upheld. (St. Charles Colleges v. Carroll)**

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* At times, however, charters did specify in some detail the use of an initial grant or donation which supported the founding of the institution

** Obviously, one consequence of the management of a trust has to do with changing conditions over time. It clearly becomes a matter of concern when the desire of the donor can no longer be fulfilled or becomes not practical. At least within the scope of this study such a situation did not appear in the court decisions reviewed in large part, one suspects, because the thrust of this investigation was upon impacts upon board authority and not upon a detailed exposition of the full scope of their corporate powers.

Public. Constraints upon the corporate authority of boards to manage public institutions have to be viewed in the context of the sovereignty of the legislature. Except where constitutional provision specified otherwise, the custody and control of the funds of a state college or university are subject to statutory provisions and regulations. Consequently, as Elliott and Chambers commented in 1936 but which characterized the situation at the turn of the century as well, "the power of the legislature to control the expenditure of funds appropriated by it. . . is practically unlimited in most states." (1936, 260) For purposes of this analysis, it appeared reasonable within this context to search for any refinements of this generalization and to recognize that instrumentality of the legislature, the state treasurer, or state auditor.

A reasonable conjecture would suggest that in practice relationships between institutions and agencies of state governments varied according to local conditions having to do with the political climate, personalities of significant leaders, traditional modes of action, and the like. One suspects also that the comment of Elliott and Chambers held for 1910 as much as it did in 1936 that there existed "a wide variation among states with regard to the degree to which the management of state colleges and universities is subject to control by non-educational authorities of the state government." (1936, 249) Certainly, the review of the statutes confirmed this conclusion. Only half of them contained provisions which explicitly constrained the autonomy of boards in this connection. Some, such as that for Colorado, imposed a debt limitation based upon the "ability to pay from annual income of the university, for the then current year." Others forbade the use of the permanent fund for other than current expenses

and occasionally, as in the instance of Oregon, specified that interest accrued from these funds should be used only for the salaries of the president and faculty and for current expenses. The Indiana statute contained detailed sections related to an idiosyncratic situation associated with lands and loans; and that for Wisconsin specified in detail how gifts and bequests were to be handled. Interestingly, the other half of the statutes either were silent on this matter or awarded trustees, as in the case of Arizona, the right of financial management "as they may deem expedient."

The sovereignty of the legislature received positive confirmation in a Nebraska case of 1877. (Regents of the University v. McConnell) This decision confirmed the authority of the legislature to make the state treasurer custodian of the funds of the University and in the process to eliminate the office of treasurer of the University. The Regents had brought suit to recover control of funds and lost. The decision of the court addressed the issue directly with the following assertion:

> But this incorporation, under the name of "The Regents of the University of Nebraska," is not, in any sense, to be considered in the nature of a private eleemosynary corporation for the general promotion of learning, because its whole interests and franchises are the exclusive property and domain of the government itself, and, therefore, it is in the strictest sense a public corporation.

The court made reference to an earlier case, in 1851, related to the public schools in which the Nebraska court specified that public corporations "are but parts of the machinery employed in carrying on the affairs of the state." (Trustees of Schools v. Tatman) This action received further confirmation in another case four years later in which, while supporting payment of a salary held up by the treasurer, the court made clear that it would not "look into the wisdom or policy of. . . legislation for the

purpose of giving it some other meaning than that appearing on the face." (State of Nebraska e rel. McLean v. Liedtke) It substantiated the point that the state treasurer acted in his official capacity for the state and not as an officer for the board. Subsequent legislation solidified the state's control by setting up a system of vouchers certified by the state auditor as a basis for expenditures. This action also was upheld in the courts. (State ex. rel. Dale v. Moore, State ex. rel. Board of Regents v. Moore) A ramification of this appeared in an 1870 Iowa supreme court decision which upheld the forfeiture and sale of certain lands by the trustees of the agricultural college on the grounds that they in fact belonged to the state. (Smith v. Iowa Agricultural College)*

The authority of the legislature over the financial management of the university received further confirmation in Nebraska. In an 1885 case, a court made reference to the two decisions noted above (Regents v. McConnell and State v. Liedtke) to insist upon the necessity of legislative action in the disposition of funds derived "from interest from sales of university and agricultural college lands, rents received for leases of the same, and the three-eights of one mill tax...." The court's prohibition was very definite, stating that "the regents, in the absence of an appropriation by

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* While constitutionally-based universities remained free from direct legislative control, or the potential for such, one kind of exception was recognized in a Michigan case. This 1911 decision recognized the independence of the University, but went on to affirm that the institution is bound by the conditions attached to legislation if it accepts the appropriation which the legislation authorizes. (People v. Regents of the University, 18 Mich. 469) In subsequent decades the autonomy of the University underwent significant change, making it increasingly responsive to legislative will, as a consequence primarily of the power of the purse. This change is examined in detail in a 1972 publication authored by David B. Laird. (Noted in references.)

the legislature, have no right to appropriate any part of the regents' fund." (State ex rel. Bessey v. Babcock) In general, it appears that in the few instances of court actions which involved legislative action or interpretation of it the courts took a very literal view in confirming legislative authority. From the dearth of cases outside of Nebraska, one can only assume that the kinds of controls noted in the review of statutes prevailed without contest. In any event, these constraints were sufficiently limited over all to suggest that while legislative authority reigned legislatures did not intrude very extensively into the financial management of public institutions. What one can obtain from this material, however, is that precedent had been established for the more extensive assumption of control by agencies of state government which came later.

Tuition and Fees

Clearly, tuition and fees serve as a much more important source of income for private institutions than for public ones. This follows from the nature of their financing and parallels the greater autonomy from governmental control inherent in their establishment. As noted in a previous connection, the brevity of private charters, in contrast to statutes for public colleges and universities, allows a wide lattitude in control of financial management to their boards. In his study of court cases involving relations of institutions to students, Robert A. Lowry found that "the power of a private college to level fees as a condition precedent to admissions evidently has not been challenged directly in the courts." (1970, 32) The constraints that were placed on such boards by the courts had to do with the contractual relationship inherent between institution and student once a fee was paid. Thus in a Pennsylvania case in 1870 the court

insisted upon the obligation of a college to provide appropriate, announced, courses of study to a student once they accepted his fees. (Iron City Commercial College v. Kerr) The nature of an implied contractual relationship between institution and student, however, is broader than this particular question and will undergo further discussion in the section on students. What is clear at this point is that constraints upon board authority to level charges of this sort inhere entirely in the public sector.

The authority of boards as public corporations to levy tuition, fees, and other charges was, and is now for that matter, simply one aspect of board-legislature relations. Legislatures commonly enacted measures which specify tuition and fees for state institutions. Courts have upheld this authority. One good example of such a case was that in Washington in 1916, the consequence of a student challenge to a $10 entrance fee and $10 per semester tuition charged by the board of the University. The court simply held that the students' arguments "as cogent as they are, should be addressed to the Legislature and not to the courts." (Litchman v. Shannon) Nearly half of the founding statutes for public institutions required boards to admit resident students or certain classes of students, such as those in "normal departments" or who indicated an intent to teach, with no tuition charge. The remaining statutes were silent on this matter, which implies that boards retained this authority, subject clearly to any subsequent instructions which the legislatures might impose. In addition, several states required boards to provide free education or scholarships to one or more students from each county of a state, although in general boards retained the right to establish appropriate academic requirements

so that these allotments actually took the form of what might be called permanent scholarships. The University of Kentucky was required to provide free tuition to students studying for the ministry.

Without exception the courts upheld legislative preeminence in this area. In 1895, a Kansas court ruled that the Regents of the University there could not collect a five dollar fee from each student for the use of the library, because the legislation set free admission for residents. The board needed express authorization from the legislature to impose such a fee, according to the judgment of the court. (Kansas ex rel. Little v. Regents of the University) Again, in 1916 in Washington the court upheld the constitutionality of legislative power to set an entrance fee and tuition charge. It found no precedent in practice for the public schools, and refused to question the judgment of the legislature. (Litchman v. Shannon) Some modification of this position did appear in court decisions, although not in a manner that affected the prerogatives of the legislature. A Wisconsin court in 1882, for example, upheld the right of the Regents there to charge fees to cover costs of maintenance and equipment after a student had been admitted. A laboratory fee falls into this same category. (State v. Regents of University of Wisconsin) In its decision the Wisconsin court made reference to a similar case in Louisiana wherein the court barred the board's right to set an admission fee but separated that from one involving the use of laboratories. (City of New Orleans v. Board of Administration of Tulane Education Fund) Thus, while the courts affirmed strongly the preeminence of legislatures, they recognized an implied board authority to do what was required to accomplish the purposes for which the institutions were founded. A 1912 case in Oklahoma asserted

this point by upholding fees prescribed by the regents of the Agricultural and Mechanical College for which state funds were not available, viewing them as "reasonable and necessary and conductive to carrying out the purposes of the institution." (Connell v. Gray) From these cases one can assume that at the turn of the century public boards did exercise considerable lattitude in requiring fees they deemed necessary for the management of their institutions, although subject to what initiative individual legislatures might wish to take.

STUDENTS

The course of American higher education in the eighteenth and nineteenth centuries continued undisturbed by formal student challenges to the authority of colleges. In many important ways, however, the quality of the educational experience of undergraduates rested upon the campus life as it evolved out of student activities and traditions. One can hardly underestimate the impact of this campus milieu and the associations and activities associated with it as an influential deterrent to many of the moral, religious, and educational aspirations of trustees, presidents and professors. Nonetheless, however influential informal student activities may have been, in the formal realm the authority of boards prevailed. Boards through presidents and faculty members held an in loco parentis position of both authority and responsibility which fit well with the attitudes of the era. The idea of a kind of parental role for college authorities had support in both the statutes governing institutions and in the court cases brought on by students protesting policies or conditions. The "for example" case generally used to illustrate this situation is that of Berea College in 1913. (Blackwell, 1961; Edwards-Nordin, 1979) In this case, the court upheld the right of college authorities to restrain students from eating off campus as a matter of the power of trustees to protect young students and viewed this policy as reasonable in the context of trustee responsibility for the physical and moral welfare and the education of the students. (Gott v. Berea College)

Despite the extensive recognition of the in loco parentis relationship, the authority of boards as private or public corporations was not without

some constraints in matters of student affairs. In the first place, the idea of parental supervision tended not to carry over into the professional schools, such as medicine and law. In the second, whatever their status as young and inexperienced, students did possess some rights as individuals, especially when related to questions of arbitrariness and due process. This review of statutes and court decisions identified a limited number of such restraints upon board authority in three general areas: that of admissions, that of student conduct and educational progress, and that of the award of diplomas and degrees.

Admissions

As in other areas, private boards faced fewer restraints than public agencies. In general, private colleges had the right to admit the applicants they chose, despite some limitations associated with a specific clientele in colleges tied to a religious denomination or founded for a specified race. What restrictions did appear in the charters, as discussed in a previous section, were of a positive sort in that they forbade discrimination on the basis of race, religion, or sex. However, within this general framework two exceptions did emerge from appeals to the courts against institutional policies and decisions. One substantiated a consequence of admission. Once a student was accepted, this acceptance established a form of contractual relationship. The other involved the right of a legislature to establish a general social policy which applied to a private college as well as a state institution.

The first of these constraints was voiced in 1870 by a Pennsylvania court which found that the payment of a fee at the time of acceptance obligated

the college either to provide the instruction announced or to refund the tuition fee (as was the decision in this case). In effect, the act of accepting a student implied a contract to provide designated services. (Iron City Commercial College v. Kerr) The contract idea received a further assertion in 1909 by a Michigan court. The court recognized that private colleges and universities may select at admissions students deemed desirable and discriminate by sex, age, proficiency in learning, or otherwise. However, once admitted the college accepted an obligation of a contractual nature, according to the court; and in this case it could not refuse continued attendance to students on the grounds that they were black. Interestingly, the court found that a mandamous requiring readmission was not the basis for assuring a fulfillment of the contractual obligation. This meant that the recourse of the students was a suit for damages. (Booker v. Grand Rapids Medical College)

The second restriction on the corporate autonomy of boards related to the well-established position of the legislature as the sovereign source of authority for a charter. The question of relationship between the state government and a private institution arose in 1908 in connection with Berea College in Kentucky and involved a statute prohibiting the teaching of white and black students at the same time and in the same place. The College's challenge to the constitutionality of the act reached the Supreme Court of the United States. This Court upheld the state courts in an action against the College. The Court viewed the act as in effect an amendment to the charter which the state in its constitution reserved the right to alter or amend. The Court confirmed previous decisions supporting the validity of such charter reservations noting that this question "is settled," providing that such action did not "defeat or substantially impair the object of the

grant or any rights vested under it." (Berea College v. Commonwealth of Kentucky) While boards of private institutions do hold a very substantial autonomy from state governments and thus have wide lattitude in directing internal affairs, they were subject to legislative mandate in questions of social policy.

In the public sector, legislative wishes controlled admissions policies as they did other aspects of the management of state colleges and universities, although as in other facets of internal affairs legislative direction did not intrude extensively. In the determination of admission policy, public institutions did need to conform to public purpose set by legislatures. This view was forcefully expressed by an Indiana court which reviewed previous decisions and then stated that the admission of students rested "upon well-established rules, either prescribed by law or sanctioned by usage." The court affirmed the right of all residents of a suitable age, not disqualified by disease or mental or physical infirmity, to attend the university in question, a right "which the trustees are not authorized to materially abridge, and which they cannot, as an abstract proposition, rightfully deny." (State ex rel. Stallard v. White et al.) As well, statutes under which public institutions operated rather uniformally expressed the right of equal opportunity to all citizens of a state, including both sexes. What appears generally unstated in statutes and apparently not challenged in courts, or perhaps not exercised by boards, has to do with policies which control admissions on the basis of prior educational study and/or quality of this study. Some statutes mention prior study in elementary or secondary schools, such as that for Colorado which specified that courses in collegiate and scientific departments shall

begin "where the same are completed in high schools;" or, as for Iowa, "no student shall be admitted who have not previously completed the elementary studies, in such branches as are taught in the common schools throughout the state;" or for New Mexico and Ohio State which did grant to boards the right to prescribe rules and regulations governing admissions.* Also, it was not uncommon, as noted above, for legislative action providing public scholarships and thus admissions for students selected on a geographic basis, such as a county or legislative district.

The one issue which did arise in the courts regarding the control of admissions concerned members of secret societies or Greek letter fraternities which had gained considerable public disapproval about the turn of the century. Two cases set different precedents in this regard. In one, an Indiana court supported the right of an applicant to be admitted to Purdue University despite trustee regulation against members in such a society. In the terms of this decision, a board could not discriminate in admission policies on this basis, although the institution could have regulations which prohibited membership for students once they were admitted and thus became, in the words of the court, "subject to the jurisdiction of the institution." (State ex rel. Stallard v. White) In the other case, an applicant for admission to the law school of the University of Mississippi was refused by a board action designed to implement a state statute forbidding members of secret societies. This case reached the Supreme Court of the United States which upheld the state court and the

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* The Nebraska statute was more specific, requiring that the university accept students who passed an examination in "a reasonable course of study" prescribed by the board.

University on the basis of legislative authority. The Court maintained the principle that the legislature had the right to control public colleges and universities of the state and legislate for their welfare and impose the duty upon the trustees to enforce its will. Trustee authority over admission was bound by the legislative desires when explicated in a statute. (Board of Trustees of the University of Mississippi v. Waugh)

Student Conduct and Educational Achievement

Over time several legal theories related to student-institution relationships have existed. One viewed, for example, attendance at a college as a privilege and not a right; another that boards and their administrators held the institution in trust for the students. More recently, courts have tended "to use either a contract or a constitutional rights analysis." Under the contract theory, admissions constitutes a mutual agreement between the students and the college to which both parties were obligated to adhere. The constitutional theory afforded protection to students, primarily in public colleges and universities, under the Fourteenth Amendment. (Edwards and Nordin, 1979, 350-1)

In the late nineteenth century, while the concept of admission as a contract did appear in court decisions, probably the prevalent attitude came closer to the traditional in loco parentis view of relationships between college authorities and students. A number of cases confirms this generalization. In an 1866 decision involving Wheaton College, an Illinois court held that the general authority of boards was mitigated only by "divine and human law." (People of Illinois v. Wheaton College) A less sweeping view reaffirmed the authority of the board in an 1882 Indiana case which asserted that students implicitly or explicitly promised upon entrance

"to submit to and to be governed by all the necessary and proper rules and regulations." (State v. White) The Wheaton College decision served as a major precedent for the Kentucky 1913 Gott v. Berea College case, noted earlier, upholding the right of a college to prohibit students from patronizing a local, off-campus restaurant. The decision reaffirmed the view that "college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils." It further stated that "whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents." This perception of relations with students culminated in a 1917 decision upholding the dismissal of a student who publicly made disparaging remarks about the leadership of the nation in the conduct of the war and which was reported in the press. One suspects, of course, that the emotions of the war years entered into this determination. (Samson v. Trustees of Columbia University)

By the turn of the century, however, some constraints upon board authority over students had begun to appear. This was anticipated to a degree in an 1887 finding which involved the in loco parentis doctrine at a Missouri normal school. The case concerned the attendance at a social affair of a student living at home. The young lady in question had been expelled for her action, but the court ordered reinstatement on the grounds that parental consent -- parental discretion -- was primary to board policy in this regard. (State ex rel. Clark v. Osborne) By the time of the first World War courts had begun to recognize three general limitations upon the power of boards: the necessity for rules and regulations to be reasonable, the right of students to some due process

and appropriate hearings, and the requisite of an indication of the reasons for actions taken. In effect, the decisions which supported these three principles placed constraints upon board capriciousness and arbitrariness, as follows.

Reasonableness. A recognition that rules and regulations of institutions should be reasonable and fair entered some decisions as a concomitant of the plenary power of boards. In this sense, for example, the Indiana court in 1882 spoke of the power of boards as not justifying "anything which may be construed as an individual discrimination." (State v. White) Courts affirmed that they would not interfere with trustee rules and regulations unless they were unauthorized, unreasonable, or against the common rights. (Mack and Hale, 1971, 997) More positively, in 1891, while the primary issue was a constitutional one involving attendance at chapel, an Illinois court did uphold the correctness of disciplinary actions such as expulsion or refusal of readmission when evidence confirms that the regulations in question were reasonable. (North v. State University) In two cases which previously entered into this analysis, courts found in favor of student appeals on the grounds of reasonableness. In the 1909 Michigan case referred to earlier, the court spoke of an "arbitrary refusal to permit further attendance" as a basis for its upholding the rights of two black students. (Booker v. Grand Rapids Medical College) Responding to the complaint of a law student dismissed from a Baltimore law school, a Maryland appeals court upheld the right to mandamus to restore his status as a student on the basis that the school authorities had acted unreasonably or unfairly, although this was not explicated in its decision. The court found the complaint a proper one in the context of the circumstances and policies of the institution. (Baltimore University v. Colton, 1904)

Finally, the idea of reasonableness received an interesting distinction in the case of Gott v. Berea College (1913) referred to above. While upholding the rule that colleges may prescribe requirements for admission and regulations for student conduct, the court noted that the "only limit" upon these authority lay with public institutions in which "their rules are viewed somewhat more critically" than with private institutions, recognizing the degree of public control which followed public funding.

Due Process and Proper Hearings. A second area in which courts have restrained board authority in this area relates to the right of students to a formal review prior to disciplinary action such as expulsion. In some decisions, this comes through in the context that the college action was upheld because this form of due process was provided to some degree or other. In the 1901 Western Reserve University case, mentioned previously, the court did recognize that an opportunity for the student to appear before the faculty and state his situation had been afforded. He could defend himself and present evidence. (Koblitz v. Western Reserve University) In a 1902 New York University case, similarly, the institution was upheld on the basis that an investigation had been made prior to the determination. (Goldstein v. New York University) Conversely, while a court did not specify formal or judicial review, because such institutions could not compel attendance of witnesses, it did call for reasonable due process, fair and appropriate to the case. (Vermillion v. State ex rel. Engelhardt, 1907) In an 1887 Pennsylvania case, a district court did issue a writ mandamus reinstating a student on the grounds that prior notice and formal hearing following time for the student to prepare were not provided. (Commonwealth ex rel. Hill v. McCauley)

Reasons for Actions Taken. Finally, courts insisted that students receive reasons for actions by colleges and ordered reinstatement of expulsions where such rationale was missing. Thus, in a 1908 case in Minnesota, while viewing the board as a public corporation with final control over educational matters, the court affirmed that specific reasons must be provided for dismissing a student and that the expression "deficiency in work" was not sufficient. (Gleason v. University of Minnesota) Similarly, a California court in 1902 refused to accept as a reason the statement to the effect that a student was not mentally qualified to be a teacher when there was evidence of passing grades and no allegation of a bad character. It ordered reinstatement. (Miller v. Dailey) The same point appeared in an 1898 court decision in a Minnesota normal school case involving a refusal to allow a student to continue in its program. (Jackson v. State ex rel. Majors)

Graduation and Degrees

Restraint upon board authority consequent to student appeals to the courts was relatively limited in this category and, on the whole, was associated with decisions already referred to. It divides generally into two kinds: that associated with protection from arbitrary and capricious actions and that associated with the contractual nature of the student-institution relationship once the student gains admission.

Courts did protect students from injustices clearly resulting from the lack of due process or arbitrary actions on the part of administrators or boards. As previously noted, such instances tended to respond to situations in professional schools -- medicine and law especially -- where degrees or diplomas held critical importance for an individual's livelihood.

An 1891 New York City case etched this situation clearly. The secretary of the faculty refused to allow a student to present himself for the final examination, as a consequence of which the corporation refused to confer the degree of doctor of medicine. No grounds were presented, the College resting upon its inherent right. While noting that it would not review the discretion of the corporation for "any reasons or cause" given, the court made it clear that it would not accept an "absolute and arbitrary" refusal to give a reason and ordered that the student be allowed to take the examination and be awarded the degree if he passed it. (People v. Bellevue Hospital Medical College) In the 1908 Nebraska case, as another example, an appeal court issued a writ of mandamus to force the award of a degree on the grounds that the dean of the faculty had so recommended and the board had acted arbitrarily in refusing to make the award. (State v. Lincoln Medical College) However, in this latter case, the burden of proof lay clearly with the student, a condition confirmed six years later in an Oregon case in which the court found that the claimant had failed to prove that the faculty had deliberately lost a missing examination. (Tate v. North Pacific College) In other words, lacking clear evidence of arbitrary and capricious action on the part of the institution, the court proved reluctant to impose its judgment over that of the corporation as to the fitness of the student to receive a degree. In this regard, the Oregon court was consistent with previous decisions, as for example in two New York cases involving a medical school (People v. New York Homeopathic Medical College) and a law school (People v. New York Law School) in 1892 and 1893 respectively.

Similarly, as in instances of arbitrariness on the part of college

authorities, courts recognized the contractual implications of catalogs which set forth degree requirements but never in the sense of imposing their judgment on substantive considerations. The faculty serving as agents or employees of the board judged a student's qualifications with final determination resting with the board as the corporate body. Courts did hold boards to specifications published in catalogs. A distinction was recognized between the right of final judgment as to the competence of students by a board, as advised by the faculty and administrators, and its obligation to respect the requirements published for the degrees involved. As noted previously, the acceptance of a student was viewed by the courts as a form of contractual agreement on the part of the college or university to which both parties -- student and institution -- were obligated. In matters of discipline and the enforcement of rules and regulations, this contractual interpretation upheld board authority; at the point of graduation, however, it did serve at times to protect students. This was the basis for the decision of a Wisconsin court in 1906 which supported an appeal from a dental student who had been denied a degree even though he had paid all fees and completed satisfactorily all educational requirements. (State v. Milwaukee Medical College) It was clearly implicit as a factor in a 1908 decision by a Nebraska appeals court which upheld the mandamus writ of a lower court compelling the institution to award the degree to a woman student who likewise had met all requirements at a private medical college. The court quoted the 1906 Wisconsin case but worded its opinion in terms of what it perceived as a statutory duty on the part of the college board, which appears to get at the same end through a different perspective. (State v. Lincoln Medical College) As a final example, the Oregon supreme court in its 1914

decision referred to the issuance of the college catalog and to the matriculation of the student with knowledge of the requirements in the catalog and commented: "These acts on the part of the college and of the plaintiff constituted a contract." Its decision affirmed this view, although it supported a lower court decision against the student on the grounds that within this frame of reference there was no proof of bad faith or arbitrary action. (Tate v. North Pacific College)

Generally, in the area of student relationships, statutes and courts offered relatively limited constraints upon the actions of governing boards and their agents, presidents and administrators and faculty members. In the traditional undergraduate colleges and programs of universities, students were viewed as a kind of ward of the institution, itself responsible in an in loco parentis mode to the parents and to society. Yet, even in this situation, boards did not hold a totally free hand; certainly they were legally subject to legislative supervision, very directly in the public sector, and somewhat obliquely in terms of the formal rights of legislators to amend charters of private institutions. The 1906 Berea College case stands out for this latter condition. Courts did expect that boards and institutional representatives would exercise a reasonable and not an arbitrary supervision of students and would afford at least some form of due process for review of violations of institutional requirements and policies. As Elliott and Chambers note with reference to the award of degrees, student appeals to courts when degrees were in question largely emanated from professional schools of a proprietary nature which have tended to disappear since the turn of the century. (1963, 40) These cases apparently did not set precedents for the more numerous appeals to courts

in recent decades; rather, one senses that boards as corporate bodies held almost complete power as well as formal authority at the turn of the century in relationships with students.

SUMMARY OF FINDINGS

Not unexpectedly, the most obvious finding derived from the study was an affirmation of the legal distinction between private and public colleges and universities. It was accentuated by the brevity of the charters in contrast to the specificity of statutes. One finds a good example of this by comparing the charter for Beliot College with the statute founding Indiana University. Authorization to the Beliot board required a page and one-half which conveyed basic corporate authority, designation of location and educational offerings in the arts and sciences, control over internal affairs, board membership, control over finances, and a non-sectarian status. Provisions for Indiana required 138 sections and 24 pages, detailing all facets of the institution's management. In effect, with few exceptions, private boards received full legal authority to manage the affairs of their institutions, while public boards functioned within constraints which emphasized their obligation to state governments.

As we have observed, the distinction goes back to the creation by the Dartmouth College Case of a contractual autonomy for private colleges. While subsequent courts did allow modification of this through reservation clauses in charters and statutes, the status of private boards as corporations remained intact. Constraints that the courts did impose lay with restricting boards to the provisions of their charters, to reasonableness and due process in their relations with faculty members and students, and a responsiveness to legislative action in the interest of the public good. As discussed, this latter constraint appeared in the famous Berea College case concerning legislation requiring a separation

of black and white students, which the Supreme Court upheld as binding on the College. At the turn of the century, private boards in the main enjoyed the authority to manage the affairs of their institutions. Even though in law their institutions were perceived as performing a public function, one sufficiently in the public interest to separate them from corporations established for profit, legal constraints upon their autonomy were very limited.

In the public sector, for the few institutions established by constitutional provision, an autonomy somewhat parallel to that for the private institutions did exist, particularly insofar as legislative supervision was concerned. "A fundamental principle of public law is that a constitutional mandate is superior in dignity to a legislative statute." (Brody, 1935, 165) However, legislative power does follow to a considerable degree public funding. Courts recognized an obligation of boards of these institutions to adhere to the purposes indicated when legislatures provided funds. Constitutional status blocked legislative intrusion into the internal management of these institutions in a direct or legal sense, recognizing in practice that legislative control of budgetary allocations could hardly have been ignored. The classic illustration of this autonomy appeared in the late nineteenth century in Michigan. There, the regents of the University successfully resisted legislative efforts, beginning in 1855, to require the establishment of a program in homeopathy in the department of medicine. The regents retained the right to accept or reject an appropriation, although, it should be noted, acceptance implied an obligation to comply with legislative purpose accompanying such funds. A 1909 revision in the state constitution reinforced and extended the authority of the regents to control funds appropriated by

the legislature. As a footnote to this, it should be mentioned that in the course of the present century legislative power of the purse proved increasingly an effective instrument for control of the University.

For statutory colleges and universities, the situation proved substantially different. As stressed repeatedly in our analysis, as with the mythical king, what legislatures granted they could take back. This form of public corporation held a special, limited status as an agency of state government. Thus, the sovereignty of legislatures over this category of institutions which constituted the bulk of public colleges and universities, carried with it the clear right, even though only occasionally exercised during the period of our study, to intrude into internal affairs. The only limitations here appeared in states in which the constitutions did make some prescriptions, such as requiring their establishment to begin with, fixing locations or designating the mode of appointing board members. In a few instances, such as Missouri, Montana, Nebraska, and South Dakota, constitutions vested control in the board but then assigned the legislature authority to regulate its functions and activities. (Brody, 1935, 218) In any event, legislative right to close down a college or university, which would constitute the ultimate action, was a very theoretical consideration during an era of expansion.

Moving to the specific aspects of board authority explored in the analysis, the investigation disclosed few restrictions imposed by legislatures or courts upon board control of educational program. Except for the obvious constraints in charters for female colleges or those for blacks, boards of private colleges were free to make educational decisions as their judgments and recommendations from presidents and faculties, to

the extent that they were involved, determined. For public boards, statutes did impose certain provisions against sectarian or political influences and, in some instances, specifications covering areas of instruction to be offered, especially with reference to the traditional arts and sciences and to certain professional studies such as engineering, agriculture, teaching, law, and medicine. Educational opportunity for women was uniformly required. It is interesting to note that for private colleges several charters imposed a role for faculty in the evaluation of students and the award of degrees, a situation confirmed in one court decision.

Similarly, in their relationships with faculty members boards faced few constraints. Courts consistently recognized the right of the employer to employ, control, and dismiss employees in colleges as in other corporate entities in the private sector. In the public, consistent with the situation for other areas, legislative will prevailed when imposed upon institutions even when contrary to arrangements made by boards with individuals and in policies covering appointments, conditions of service, and dismissal. Nonetheless, faculty members were viewed as employees of boards and subject to their control and not as officers of the state directly under legislative mandate. Such legislative intrusion came to light very infrequently, yet the legal implication remained, that boards of statutory colleges served as agents of the legislature. By the turn of the century, however, some modification of board authority in this connection had begun to appear in court decisions which began to recognize due process protection for faculty members as a consequence of a view that arrangements with boards were of a contractual nature. This held

primarily for private institutions but carried implications for public ones as well.

In the area of financial management, the brevity of charters enhanced board authority, a situation upheld by the courts. Public boards were subordinate to statutory restrictions upon, usually, the use of permanent funds and accrual of debts as well as to legislative authority. This latter included measures stipulating fees which could be charged. The financial relationships with state governments accentuated the status of public boards as agencies of state government. Thus, courts upheld the right of a legislature to make the state treasurer custodian of university funds; they have viewed the holdings and funds of these institutions as, in effect, the property of the state. The study leaves no question but that for financial affairs state governments and the courts viewed colleges as agencies of state government.

Finally, in relationships with students prior to the turn of the century a sense of in loco parentis responsibility prevailed in higher education for college undergraduates. As in other areas, the freedom of private boards from external constraints was matched by the sovereignty of the legislature in the public. However, some modifications did appear which merit mention. Public colleges had an obligation to provide opportunity for academically, morally, and physically qualified citizens of a state who applied, an expectation affirmed in statutes and confirmed by courts. In a concurrent expression of egalitarianism, courts upheld the right of trustees to prohibit student membership in secret societies, although this could not serve as a criterion for non-admission. As noted, the Indiana case on this question went to the United State Supreme

Court. In addition, two other forms of constraint on board authority did surface about the turn of the century, related first to some protection from arbitrary and capricious actions and second to a recognition of the contractural obligations of institutions. Where the first came to court attention, decisions referred to the responsibility of boards, administrators, and faculties for reasonableness and due process in student relations, but, interestingly, laid upon students an obligation to prove their contention. Clear evidence of unfairness was called for. In the second situation, courts recognized that provisions set forth in catelogs and other published announcements constituted a form of contract to which colleges were obligated in providing educational opportunity to students. However, this point of view held both ways, also imposing a responsibility upon students to adhere to the ground rules.

In sum, we have drawn from this study a confirmation of an anticipated finding. Private boards benefitted from an institutional autonomy associated with their position as a private corporation, subject primarily to constraints in their charters (which were uniformly quite brief), to due process and reasonableness, and to governmental policies designed to maintain a governmental conception of the public good. Public boards varied from those for the eight or nine constitutionally established universities which held a position conceived of as a fourth branch of state government to the statutory colleges and universities which were bound to legislative will. However, it would be unwise to equate legal constraints with practice. Except for the special situations which reached the courts, in general practice governing boards in the public sector were accorded the position of relatively autonomous agencies manned by

members who served as private individuals rather than governmental officers and in doing so did provide a high degree of freedom from governmental control.

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Butler University
University of Chicago
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Denver University
Johns Hopkins University
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Mills College
Northwestern University
Oberlin College
Princeton University
St. Lawrence University
Stanford University
Syracuse University
Vassar College
Wesleyan University
Wheaton College

Public

University of Arizona
University of Arkansas
University of California
University of Colorado
University of Georgia
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